A SMATV commentary from Fred Hopengarten, attorney and president, Channel One Inc., Newton, Mass.

The problems of private cable on private property

On Aug. 21, 1986, the Massachusetts Community Antenna Television Commission (MCATC) petitioned the FCC to interpret the Cable Act's definition of a cable TV system. MCATC asked the FCC to rule that a private cable system located within a condominium community which includes single family homes is not subject to the SMATV exemption from cable franchise regulation, even though the condominium complex is entirely on private land and no streets or public ways are used.

Since the commission's decision in *Earth Satellite Communications Inc. (ESCOM)*, local authorities have been preempted from regulating SMATV systems in the manner of cable systems. The basis for local authority over cable, the FCC said, is the use of public rights-of-way. There is no equivalent basis for local regulation of SMATV systems on private property.

Unfortunately, the Cable Communications Act of 1984, instead of addressing the issue directly, simply said that the Congress did not intend to change the outcome of the *ESCOM* decision—then on appeal before the U.S. Circuit Court in Washington. Thus, Congress left prior language untouched, and set up a situation in which an undefined term, "multiple unit dwellings," appears to have continued relevance. The act exempts systems from the definition of a cable system which serve "multiple unit dwellings under common ownership, control, or management, unless such a facility or facilities uses any public right-of-way."

CSR-2997, the MCATC petition, asks what, exactly, the phrase "multiple unit dwellings" means. Commenting on this question, the City of Scottsdale, Ariz., has written:

"As to the meaning of 'multiple unit dwellings,' neither the Cable Act nor its legislative history defines this term."

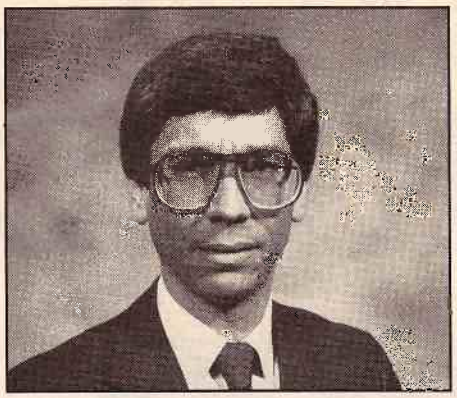
Scottsdale's filing continued, however, to note where the definition came from:

"...[T]he language of the first and second elements was taken verbatim from the FCC definition of a cable system existing prior to the passage of the Cable Act."

In other words, the Cable Act did not create, as some claim, a new definition of who is exempt (with respect to multiple unit dwellings) from the requirement of getting a franchise. Putting it another way, Congress said: We adopt the expertise of the appropriate administrative agency.

In 1978, when that agency adopted the reference to multiple unit dwellings, the FCC wrote:

"By adopting the language...we are attempting to resolve the ambiguous situations. We think the resolution is clear enough."



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Obviously it wasn't, as the matter is now back before the commission. If it had been clear enough, there would never have been an *ESCOM* case, with its appeal, and a special section of the new Cable Act intended not to upset the *ESCOM* case.

So what was the intent of the Congress? Both houses of Congress wrote committee reports which encourage the growth of SMATV as an alternative to, and competitor with, franchised cable TV.

Since the act, the commission has issued a Memorandum Opinion and Order that relies on use of the public rights-of-way as a means of distinguishing SMATV from franchised cable, saying that "when multiple unit dwellings are involved, the distinction between a cable system and other forms of video distribution systems is now the crossing of the public rights-of-way, not the ownership, control or management."

As with any communications issue these days, no discussion of competitive services is complete without the well-worn "level playing field" argument.

Filings from the National Cable Television Association and the New England Cable TV Association (NECTA) suggest that if an SMATV operator wants to serve so much as a single detached house, among other types of housing on a single tract of private property, a franchise is necessary. The problem with such arguments is that that franchised operators do not want to permit a level playing field. There was never a level playing field.

For example, where franchised operators have sought forced access legislation, giving them the right to wire up apartment complexes without the permission of the owner, forced access is routinely limited to franchised operators, and denied to SMATV operators.

Franchised operators seek discounts from programers (some of whom are co-owned with franchised operators), and encourage programers to ask high prices or deny programing to SMATV operators. Despite testimony to the contrary before Congress this past summer, The Disney Channel still refuses to sell to SMATV operators. Arts and Entertainment, the Weather Channel and Discovery Channel also refuse to deal with SMATV operators. HBO sells only to the largest SMATV operators (those with more than 25,000 homes passed).

Programers have said that the franchised operators would ruin them if they offered programing to SMATV operators on the same terms and conditions that they offer to franchised operators of the same size and financial stability.

In its filing, Scottsdale wrote:

"To allow a[n] SMATV operator wide latitude to expand its operations so that it interconnects numerous individual residences in a community while still allowing it to be classified as a[n] SMATV and exempt from all the requirements that are applicable to a *legitimate* [emphasis added] cable operator would be basically unfair and anticompetitive.

We would rewrite that sentence:

"To allow an SMATV operator to interconnect individual residences in a community, without the use of a pulbic way, while allowing it to be classified as an SMATV operator and exempt from requirements that are applicable to a *franchised* cable operator would bring effective competition to the marketplace, in a situation where STV and MDS have been ineffective (due to the limited channel capacities of those technologies)."

The FCC has written that it is not a guarantor of the economic success a franchised cable. Here, with franchised cable outnumbering private cable (measured by homes passed) by as much as 40 to 1, of what can the franchised operators be afraid?

The Congress did not seek to promote a viable, effective SMATV industry by hobbling it with local entry restrictions. Chairman Fowler has recently said, speaking in a telephone context:

"Don't play the protectionist game in Washington. It won't work. Serve your markets."

The statement is equally applicable to local regulation of SMATV on private property.